

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD MONROE MATTHEWS,

Defendant-Appellant.

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UNPUBLISHED

November 19, 1999

No. 210686

Cass Circuit Court

LC No. 97-009309 FH

Before: Hood, P.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of more than fifty grams but less than 225 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). He was sentenced to a prison term of fifteen to forty years for the cocaine conviction and to a jail term of 148 days for the marijuana conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the prosecutor did not present sufficient evidence to support a finding that defendant possessed the cocaine. We disagree.

To be found guilty of possession of cocaine, one must knowingly and intentionally possess such. MCL 333.7403(1); MSA 14.15(7403)(1). In *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998), we explained:

A person need not have physical possession of a controlled substance to be found guilty of possessing it. Possession may be either actual or constructive, and may be joint as well as exclusive. The essential question is whether the defendant had dominion or control over the controlled substance. A person's presence at the place where the drugs are found is not sufficient, by itself, to prove constructive possession; some additional link between the defendant and the contraband must be shown. However, circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. [Citations omitted.]

Here, evidence was presented that a police officer began following defendant's vehicle after the vehicle passed the officer at an excessive rate of speed. Defendant was traveling southbound, but turned around in a driveway and headed northbound. Defendant then turned around once again and headed southbound. The officer observed defendant lean over toward the passenger side of the car many times. Defendant apparently stopped his vehicle near a burned-out vehicle and left. The officer found two baggies containing 123.84 grams of cocaine in the burned-out vehicle. The baggies, which were found in a dirty, dusty, burned-out vehicle, did not appear to be dirty or dusty on the outside. A latent fingerprint from defendant's right ring finger was identified on one of the baggies. Viewed in a light most favorable to the prosecution, this evidence is sufficient to support a finding beyond a reasonable doubt that defendant knowingly or intentionally possessed the cocaine found in the burned-out vehicle.<sup>1</sup>

Defendant next argues that he was denied his right to a fair trial as a result of prosecutorial misconduct. Specifically, defendant first contends that the prosecutor injected highly inflammatory evidence into the trial when he questioned defendant regarding his familiarity with cocaine. We disagree. Immediately before the allegedly improper questioning, defendant testified, without objection, that he knows what cocaine looks like and that the baggies appeared to contain cocaine. Hence, it does not appear that the allegedly improper questions determined the outcome. *People v Brownridge (On Remand)*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (No. 183507, rel'd 8/17/99), slip op p 3.

Defendant also argues that the prosecutor improperly asked defendant to comment on the arresting police officer's credibility by asking him whether the officer was lying or if his testimony was false or inaccurate. Defendant failed to object to this line of questioning. Absent an objection, appellate review of prosecutorial remarks is generally precluded because the trial court was deprived of an opportunity to cure the error. *People v Messenger*, 221 Mich App 171, 179; 561 NW2d 463 (1997); *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996). Nonetheless, in the absence of an objection, an appellate court will reverse if a curative instruction could not have eliminated the prejudicial effect of the prosecutor's remarks or a miscarriage of justice would result from the failure to review the issue. *Messenger, supra* at 179. After examining the pertinent portion of the record and evaluating the prosecutor's remarks in context, we conclude that failure to review this issue will not result in a miscarriage of justice. *Id.*

Defendant also argues that the prosecutor's inquiry into defendant's financial condition was impermissible and denied defendant a fair trial. Defendant failed to object to the admission of this evidence or the prosecutor's remarks during closing argument, and therefore review is limited to determining whether admission of the evidence resulted in manifest injustice. See *People v Conte*, 152 Mich App 8, 13-14; 391 NW2d 763 (1986); see also *People v Cross*, 202 Mich App 138, 143; 508 NW2d 114 (1993). Because the prosecution used this information not to show motive or defendant's credibility based on his financial status, but to demonstrate that defendant's explanation for having over one thousand dollars with him when confronted by the officer does not comport with the facts and is inconsistent with the circumstances at the time, we conclude that manifest injustice did not result as a result of the prosecutor's comments. *People v Conte*, 152 Mich App 8, 13-14; 391 NW2d 763 (1986).

Defendant next argues that he was denied the effective assistance of counsel as a result of defense counsel's failure to object to the prosecutor's allegedly improper remarks. Effective assistance of counsel is presumed, and it is the defendant's heavy burden to prove otherwise. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). To establish ineffective assistance of counsel, "the defendant must show that but for counsel's error there is a reasonable probability that the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable." *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996)(emphasis in original). Because defendant has failed to demonstrate that his counsel's representation was deficient and prejudiced him to the extent of depriving him of a fair trial, we conclude that he was not denied effective assistance of counsel.

Next, defendant argues that he was denied his right to a fair trial where the prosecutor, during closing argument, vouched for the credibility of police witnesses, denigrated defendant and his defense counsel, expressed a personal belief in defendant's guilt, and shifted the burden of proof to defendant. We review the record as a whole with the allegedly impermissible remarks read in their proper context. *People v Reed*, 449 Mich 375, 397; 535 NW2d 496 (1995). Upon review of the record, we conclude that the prosecutor did not partake in any of the alleged impermissible acts, and therefore defendant's argument is without merit. Even if the prosecutor's comments were impermissible, defendant did not object and thereby the trial court was deprived of the opportunity to give a curative instruction, which would have eliminated any prejudicial effect. See *Messenger*, *supra* at 179.

Defendant next argues that the trial court erred in failing to provide to the jury proper final instructions on all controlling issues in the case, suggesting five specific instructions that he claims should have been given because they were necessary for the jury to clearly understand the issue, and thus were "basic and controlling." In addition, defendant argues that his trial counsel was ineffective because counsel neither objected to the given instructions nor requested further instructions. "Failure to object to jury instructions in the trial court waives error for purposes of appeal unless relief is necessary to avoid manifest injustice." *People v Perry*, 218 Mich App 520, 530; 554 NW2d 362 (1996); MCL 768.29; MSA 28.1052. "A miscarriage of justice occurs when an erroneous or omitted instruction pertains to a basic and controlling issue in the case." *Perry*, *supra* at 530. Upon review of the record, we conclude that the trial court properly instructed the jury regarding the law applicable to the case even though the instructions suggested by defendant on appeal were not included in the jury instructions. On appeal, defendant either fails to adequately explain why the omission of certain instructions was error, fails to demonstrate that he was prejudiced by the exclusion of such instructions, or cites irrelevant instructions based on the circumstances of his case. Therefore, no manifest injustice occurred. The jury was properly instructed, and thus defendant's argument that he was denied effective assistance of counsel is without merit.

Finally, defendant argues that the trial court made multiple errors during the sentencing proceeding, including failure to consider the well established factors in fashioning an appropriate sentence, failure to individualize defendant's sentence; and failure to impose a proportional sentence.

Upon review of the record, we conclude that the trial court did not abuse its discretion in sentencing defendant. The trial court, which had discretion to impose a sentence twice the required

penalty based on previous convictions, MCL 333.7413(2); MSA 14.15(7413)(2), delineated on the record its reasons for imposing a sentence in excess of the minimum required by law. The trial court determined defendant's sentence based on the serious nature of the crime and defendant's prior criminal record and also determined that there was reason to exceed the mandatory minimum. Thus, the trial court individualized the sentence and imposed a sentence based on the seriousness of the circumstances surrounding the offense and defendant. We find no abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Harold Hood

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald

<sup>1</sup>Defendant suggests that the prosecution's case is improperly based on inferences from inferences, with both inferences based upon the same evidence, but such argument is without merit where we have previously explained:

“The rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends upon another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt.” [*People v Orsie*, 83 Mich App 42, 48; 268 NW2d 278 (1978), quoting *Dirring v United States*, 328 F2d 512, 515 (CA 1, 1964)(Citations omitted).]

Defendant's argument is unpersuasive based on the above sufficiency analysis, as is his argument that the prosecution failed to show by competent evidence personal, individualistic fault.